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IN THE

Supreme Court of the United States

THE ARKADELPHIA MILLING COMPANY ..... *Appellant,*

v. No. 92.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS, IRON MT. & SOUTHERN RAILWAY CO. ..... *Appellees.*

JOSEPH F. HASTY, ELIPHALET F. HASTY AND WILLIAM C. HASTY, COMPOSING THE PARTNERSHIP OF J. F. HASTY & SONS ..... *Appellants,*

v. No. 93.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS, IRON MT. & SOUTHERN RAILWAY CO. ..... *Appellees.*

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., *et al.* .....*Appellants,*

v. No. 94.

THE SOUTHERN COTTON OIL CO. .....*Appellee.*

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *et al.* .....*Appellants,*

v. No. 95.

THE SOUTHERN COTTON OIL CO. .....*Appellee.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF ON BEHALF OF APPELLANTS IN NUMBERS 92 AND 93 AND ON BEHALF OF APPELLEE IN NUMBERS 94 AND 95.

STATEMENT OF CASE.

The references herein to the transcript are to the pages of the print.

All of the above styled cases were consolidated in the court below and are here on an agreed statement

of the record. They are an outgrowth of the litigation entitled, Allen v. St. Louis, Iron Mountain & Southern Ry. Co., 230 U. S. 553.

That case involved the question whether railroad rates put in force by the duly constituted authorities of the State of Arkansas were so unremunerative to complainant railroad companies that they were confiscatory.

On the filing of the bill for an injunction (September 3, 1908) the circuit court granted a temporary injunction, and on final hearing (May 11, 1911) decreed a permanent injunction. From this decree the railroad commissioners appealed, assigning as error, and urging in this court, only the point that the finding of the court below was erroneous in its holding that the rates were confiscatory. The opinion of this court discussed only that point, and announced that the evidence failed to show confiscation. The mandate from this court to the court below contained the following provisions (Tr. 13):

"On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said Robert P. Allen *et al.*, Commissioners, etc., recover against the said complainant Three Thousand One Hundred and

Two Dollars and Fifty-two Cents for their costs herein expended and have execution therefor.

"It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Arkansas, with directions to dismiss the bill without prejudice, June 16, 1913.

"You therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

On the granting of the temporary injunction by the Circuit Court, the following order was entered (Tr. 6):

"It is further ordered that the complainant execute a bond to the United States of America in the penal sum of Two Hundred Thousand Dollars ($200,000.00) conditioned that said complainant shall keep a correct account showing, as respects the carriage of passengers and freight, the difference between the tariff actually charged and that which would have been charged had the rate inhibited been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected as far as may be practicable, which record shall be made

and kept subject to the further order of this court, and further conditioned that if it should eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, the said complainant shall, within a reasonable time, to be fixed by the court, refund in every instance to the party entitled thereto, the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages."

In response to this order, each of complainants executed and filed a bond in the following form (Tr. 6 and 7):

"Know All Men By These Presents, that the above complainant as principal, and the United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto the United States of America in the penal sum of Two Hundred Thousand Dollars ($200,000.00), well and truly to be paid in lawful money of the United States, for the payment of which they bind themselves, their successors and assigns firmly by these presents.

"Signed with our hands, and sealed with our seals and dated this 11th day of September, A. D. 1908.

"This bond is made upon the following conditions, to-wit:

"Whereas, the court in the above entitled cause, made an order on the 3rd day of September, A. D. 1908, granting a restraining order and providing among other things as follows, to-wit:

"It is further ordered that complainant execute a bond to the United States of America in the penal sum of Two Hundred Thousand Dollars ($200,000.00), conditioned that said complainant shall keep a correct account showing, as respects every carriage of passengers or freight, the difference between the tariff actually charged and that which would have been charged had the rate inhibited hereby been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected as far as may be practicable, which record shall be made and kept subject to the further order of this court, and further conditioned that if it should eventually be decided that so much of this order as inhibits the enforcement of existing rates should not have been made, that said complainant shall, within a reasonable time, to be fixed by the court, refund in every instance to the party entitled thereto, the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages.

"Now, if the above named complainant, St. Louis, Iron Mountain and Southern Railway Company, shall

well and truly keep and perform all and singular the conditions of said restraining order as above set forth, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

"In Testimony Whereof, the above bounden principal has caused its corporate name to be hereunto subscribed by its Vice President and its corporate seal to be hereunto affixed and duly attested, and said surety has caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed, by Sam W. Reyburn and D. H. Cantrell, its duly authorized attorneys in fact for this purpose this 11th day of September, A. D. 1908" (Tr. 10 and 11).

Later an additional bond was required by the Circuit Court in the sum of $800,000.00, signed by the St. Louis, Iron Mountain & Southern Railway Company, without sureties, and a similar additional bond was required of the St. Louis Southwestern Railway Company in the sum of $300,000.00, without additional sureties. The order requiring said additional bonds expressly provided that they "shall be in addition to the bond heretofore executed, and not in lieu thereof" (Tr. 9).

On return of the case from this court, the district court entered a decree in conformity with the mandate, dismissing the cause without prejudice, and referring

to a master, appointed by the district court, the matter of ascertaining the damages sustained by the granting of the temporary and permanent injunctions. This order directed that notice be given of the time in which claims should be filed with the master, and that in making his report the master should report separately all claims which arose under the temporary injunction before the additional bond was filed, which embraced the period between September 3, 1908, to July 5, 1909; those which arose after the additional bond was given, and before final decree, July 5, 1909, to May 11, 1911, and all those which arose after the final decree, May 11, 1911, to July 18, 1913. In making his report the master reported separately the claims that arose in these periods, designating them Series A, B and C, respectively (Tr. 17).

On December 2, 1914, the master filed his report, showing in detail the claims filed and those allowed and those disallowed, as directed in the order of reference. In that report the claim of appellee, Southern Cotton Oil Company against the St. Louis, Iron Mountain & Southern Railway Company was allowed in the following amounts (not including interest):

In Series A	$ 6,401.10
In Series B	12,671.20
In Series C	13,000.63
Total	$32,072.93

The claims of the same appellee were allowed against appellant, St. Louis Southwestern Railway Company in the following amounts (not including interest):

In Series A	$ 756.19
In Series B	1,795.34
In Series C	2,210.64
Total	$4,762.17 (Tr. 15).

The claims of the appellant, Arkadelphia Milling Company, were allowed by the master in the aggregate sum of $11,820.42 against the St. Louis, Iron Mountain & Southern Railway Company, as were also the claims of the appellant, J. F. Hasty & Sons against St. Louis, Iron Mountain & Southern Railway Company in the aggregate sum of $16,336.33 and against the St. Louis Southwestern Railway Company in the aggregate sum of $1,080.40 (Tr. 16, 17).

The exceptions of the Railway Companies to the allowance of the claims of the Southern Cotton Oil Company were only on the ground that the final decree entered by the circuit court relieved them and the sureties on their bond from all liability by reason of the granting of the temporary injunction, and an exception that there was no liability on the bonds for the claims allowed in Series C, being those that arose after final decree was entered in the cause.

There was no dispute of the correctness of the amounts allowed by the master to the Southern Cotton Oil Company.

The court overruled each of said exceptions, and sustained the allowances made by the master, rendering judgment against the respective railway companies and their surety, the United States Fidelity & Guaranty Company, for these amounts with interest at 6 per cent per annum, from an average date the parties agreed would be fair (Tr. 16).

To the allowance by the master in favor of the Arkadelphia Milling Company, the Railway Companies filed an exception on the ground that the rates considered by the master appropriate to this claim were invalid because they discriminated against shippers who do not enter into contracts with the carrier for re-shipment of the finished product of the rough material to which the rates would apply (Tr. 25).

The court sustained this exception and disallowed the claim of the Arkadelphia Milling Company (Tr. 25).

The railway companies excepted to the allowance by the master of the claims of J. F. Hasty & Sons on the ground that the movement of the rough material into the mills of J. F. Hasty & Sons and the subsequent forwarding of the finished product to points beyond the State of Arkansas constituted the movement to the

mills interstate commerce, and the State rates applied by the master were inapplicable.

The district court disallowed the claim of J. F. Hasty & Sons on this ground.

No exception on this ground was filed against the claim of the Arkadelphia Milling Company, and this point is not involved on its appeal (Tr. 25).

The District Court rendered final decrees in accordance with its respective holdings (Tr. 3).

Some persons who had claims against the St. Louis, Iron Mountain & Southern Railway Company for overcharges during the period the injunction was in force, brought suit in the State court against it for the amount of their claims, and on petition by the St. Louis, Iron Mountain & Southern Railway Company to the District Court, the parties were permanently enjoined from prosecuting these suits.

After appeal to the Circuit Court of Appeals for the Eighth Circuit, the case reached this court, and is reported under the style of St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight, et al., 244 U. S. 368. The Circuit Court of Appeals (220 Fed. Rep. 876) reversed the holding of the lower court, and held that parties having claims had the right to sue the railway companies in the State court, or to sue therein on the

injunction bond. This court affirmed the decision of the Circuit Court of Appeals.

SPECIFICATION OF ERRORS ON BEHALF OF APPELLANTS IN CASES 94 AND 95.

Appellant, Arkadelphia Milling Company, specifies that the court below was in error in sustaining the following exception of the railway companies (Tr. 25):

"2. That the provisions of Distance Tariff No. 3, Item 79, regulating rough material rates inbound, are in the alternative, and are also discriminatory against shippers who do not enter into contracts with the carrier with reference to the re-shipment of the specified percentages of the finished product."

and in dismissing its claim (Tr. 27).

Appellant, J. F. Hasty & Sons, specifies that the district court was in error in its ruling sustaining the following exception filed by the railway companies (Tr. 25):

"1. That the movement of said rough material into the milling point, and the subsequent forwarding of the finished product to points beyond the State of Arkansas, constituted interstate commerce, and the rough material rates of the defendants are not applicable."

and that the District Court erred in disallowing the claim of this appellant on that ground and dismissing its intervention (Tr. 33).

These rulings of the District Court were duly assigned as errors in the assignments of errors and prayers for appeals (Tr. 27, 33).

BRIEF OF ARGUMENT.

The doubt mentioned by this court in passing to the decision in St. Louis, Iron Mountain & Southern Railway Company v. McKnight *et al.*, 244 U. S. 368, that the lower court had power under the mandate to render judgment on the bonds, merits our first remarks.

When the mandate reached the court below, the situation it had to deal with was this: When its injunction order was issued it required that complainants keep correct account of the difference between the rates restrained and those charged, with a description of each shipment and the name of each shipper, and give a good bond that if it was eventually decided that the injunction was wrongfully issued, it would refund in each instance, in a reasonable time to be fixed by the court, to the party entitled thereto, the excess charges. The filing of the bond should precede the issuance of the injunction. The bonds were given and their terms expressly consented to this arrangement. A standing order of the court in force when the injunction was issued, provided that on such bonds summary judgments should be rendered by that court (Tr. 25). By virtue of the wrongful order of the court, complainants had collected large sums of money from shippers which, in equity, they had no right to retain and which

they and their surety had expressly agreed to return promptly. The court had power to make its rule in regard to recovery on injunction bonds given in proceedings before it. (Hawkers v. Fowler, 2 Wall. 123, 128.) The proper construction of the bond was for the United States courts to finally settle. (Tullock v. Mulvane, 184 U. S. 505). It had inherent power to correct the wrong its order had occasioned, and compel restitution or make other appropriate orders to remedy the harm done. (Northwestern Fuel Co. v. Brock, 139 U. S. 216, 218). The several parties overcharged by virtue of the wrongful injunction were before the court by representation (In Re Engelhard, 231 U. S. 646, 651); but their respective claims had not been in issue, in fact, it had just been decided that the injunction was wrongfully issued.

This court had before it on appeal only the question of the right to the injunction; this was the only question presented to this court, and was the only question considered by it, as shown by its opinion. The decree of injunction was reversed on the ground that it was not shown that the tariff complained of was unreasonable, and the court below was directed to dismiss the bill without prejudice. Could it be said this court had considered and impliedly denied the power of the district court to compel restitution of the funds its wrongful order had permitted complainants to collect,

and proceed against the security complainant had agreed with the court, should respond to this very demand?

The direction was to dismiss the bill without prejudice, and that such further proceedings be had in the cause in conformity with the opinion as ought to be had according to law, right and justice.

The claimants against the bonds would be many and the average amounts of each would be small. Separate suits would be expensive and the question of liability on the bonds for the United States courts to decide. (Tullock v. Mulvane, supra). The terms of the bonds, to pay "within a reasonable time to be fixed by the court," if sued on in other than the District Court, held out a distinct promise of delaying litigation. The closing language of the mandate was appropriate to meet the very situation before the district court and to authorize the subsidiary proceedings undertaken:

"You therefore are commanded that such execution *and further proceedings* be had *in said cause* in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States, *ought to be had*, the said appeal notwithstanding" (italics ours).

THE PROCEEDINGS WERE NOT OPPOSED TO THE MANDATE OR THE OPINION, BUT ON THE CONTRARY WERE A JUST EXECUTION OF BOTH.

If it is said the subsidiary proceedings were impliedly prohibited by the mandate, the argument can only be advanced by giving the order to dismiss the most narrow meaning, disregarding the spirit of the appeal proceedings and ignoring the closing language of the mandate.

It is well settled by the decisions of this court that its mandates shall be construed reasonably with reference to the subject matter of the litigation, the opinion in the case, and in a manner not to cause injustice.

Said the court in Story v. Livingston, 13 Pet. 363:

"The mandate is to be interpreted according to the subject matter to which it has been applied, and not in a manner to cause injustice."

And the following in In Re Howard, 9 Wall. 175:

"But the obedience thus due is not blind obedience, acting upon the letter of the judgment affirmed or mandate ordered, without any consideration of the rights of persons not parties to the litigation in which the judgment was entered."

In M. & M. R. R. v. Soutter, 2 Wall. 510, the court said:

"This construction of the mandate can not be sustained. * * * * To suppose that this court intended, in addition to these five years, to withhold the recovery of complainants for the additional uncertain period which might be necessary to litigate the receiver's accounts, is to impute to it a manifest injustice" (pages 519, 520).

A similar point to this was before the court in the Santa Maria, 10th Wheat. 441. In that case it appeared that in a prior case (7th Wheat 490) a general decree of restitution was awarded in favor of the libelant and a mandate issued from this court to carry that decree into effect. In that proceeding the claim of one of the claimants of the vessel was rejected. This claimant applied to the court below, asserting that he had incurred costs and expenses in connection with the custody of the property that aggregated a considerable amount. These claims were rejected and from this decree an appeal was taken. It was asserted in this court that the contention was disposed of by the mandate on the former appeal. Of this contention the court said (page 442):

"But upon all proceedings to carry into effect the decree of the court, the original proceedings are al-

ways before the court, so far as they are necessary to determine any new points or rights in controversy between the parties, which were not terminated by the original decree. The court may, therefore, inspect the original proceedings, to ascertain the merits or demerits of the parties, so far as they bear on the new claims, and must decide upon the whole examination what its duty requires."

In Re Sanford Fork & Tool Co., 160 U. S. 247, the court said (page 256):

"The circuit court may construe and decide any matters left by the mandate of this court; and the decision of such matters can be reviewed by a new appeal only."

In Supervisors v. Kennicott, 94 U. S. 498, it appeared that the mandate remanded the cause, "with directions to award a new trial," and as sent down commanded "that such execution and further proceedings be had, in conformity with the opinion and decree of this court as, according to right, etc., ought to be had."

In holding that the term "new trial" should not be given this significance, the court remarked: "Our mandates are to be interpreted according to the subject matter of the proceedings heard, and, if possible, so as not to cause injustice" (page 499).

In Baltimore Bldg. & Loan Assn. *et al.* v. Alderson, 99 Fed. 489, the Circuit Court of Appeals for the Fourth Circuit had before it an appeal from proceedings on one of its mandates, issued in a case in which it was held that the lower court had no jurisdiction and from which it appeared the lower court had been reversed and the cause remanded with specific instructions "to vacate the order ratifying the sales made by the receiver, and the order distributing the purchase money, and that it direct that the payments made by the purchasers be returned to them, and that the decrees for sale be set aside and the bills dismissed." When the mandate was entered in the lower court the sureties on the receiver's bond intervened and prayed that the money paid by them into the registry of the court be returned to them.

In disposing of this, the court said (page 492):

"Such is the general rule. But it must be observed that the question which came before the circuit court had never been presented to this court, and, in the nature of things, could not have been presented to it at the former hearing."

and held (page 493):

"If, therefore, the petitioners are right in their contention that they had paid this money into court under a void order and an invalid bond, the circuit court

had jurisdiction, notwithstanding the dismissal of the bill for want of jurisdiction, to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance. The circuit court was not in error in entertaining the petitions."

In In Re City Bank Petitioner, 153 U. S. 246, 251, the court held the lower court was not in error in adding interest in a judgment directed by this court, as it was apparent that the question of interest had not been considered and disposed of here.

In Ex parte Marks, 136 Fed. 168 (C. C. A. 9th Circuit), the mandate contained the same closing language as did the one in this case. The court held it authorized the correction of a mistake in interest allowed.

In Mackall v. Richards, 116 U. S. 45, 47, it appears that this court issued a mandate on the point presented to it without dealing further with the record on the appeal. In denying the contention that the decree as entered by the lower court did not conform with the mandate, this court said:

"As the appeal was taken for the sole purpose of correcting the description, it was proper to construe the mandate as in effect nothing more than an order for such a correction."

The Circuit Court of Appeals for the Eighth Circuit, must have expressly considered this point in this case in Bellamy v. St. Louis, I. M. & S. Ry., 220 Fed. 876, saying (page 878):

"The order is too broad. The court had jurisdiction of all liabilities arising out of the bonds made pursuant to its orders. It could appoint a master, before whom all claims based on these bonds should be heard, and to restrain actions in other jurisdictions to collect such claims. The bonds were judicial. The orders requiring them to be given retained the jurisdiction of the court to ascertain and enforce liabilities arising under them. That power probably existed independently of such reservation."

The district court for Missouri, in a similar case, St. Louis & San Francisco Ry. v. Barker, 210 Fed. 915, had before it this identical question and the mandate from this court (Missouri Rate Cases, 230 U. S. 474) directed that the bill be dismissed without prejudice. The court considered that this authorized it to dispose of any claims for reimbursement and to appoint a master for that purpose, authorizing parties to proceed in the State court if they so desired.

In the Minnesota Rate Cases, 230 U. S. 352, the decree and mandate was the same as in this case.

In Louisville v. Cumberland Telephone Co., 225 U. S. 430, the decree of the lower court was reversed without prejudice (page 436), and the cause was remanded "for further proceedings not inconsistent with the opinion of this court." On this authority the lower court did not dismiss the case but retained the bill while an experiment was made with the rates fixed by the city ordinance. A master was appointed to ascertain and report the earnings, etc., of the telephone company under those rates. A petition for mandamus was filed in this court in which complaint was made that the lower court had no power under the mandate to continue the litigation while the experiment was made. (In re Louisville, 231 U. S. 639).

It was conceded in the argument that the court had power to appoint a master to accomplish restitution of the excess rates collected by virtue of the wrongful injunction (page 640). The point urged upon and considered by this court was whether the lower court had power under the mandate to retain the cause for an experiment with the rates, as shown by the following excerpt from the opinion:

"Due return to the rule was made. It is, in effect, that the court considered the opinion and decree of this court permitted a discretion to retain the case for an actual experiment of the rates, and, thus considering it, made the order of March 10, 1913.

"We think the discretion was properly exercised. The terms of the mandate permitted further proceedings" * * * (p. 645).

It would seem this case is ruled by Houghton v. Meyer, 208 U. S. 149, 154, which is a precedent on the practice sustained by this court.

In that case there was a bill for injunction against the Postmaster General to restrain him from putting in force certain postage rates. The proceedings were in the Supreme Court of the District of Columbia. A temporary injunction was issued on a bond given. On final hearing the injunction was made permanent. On appeal to the Court of Appeals, the decree of the court below was reversed with the following directions:

"In accordance with those conclusions, we must reverse the decree appealed from, with cost, and remand the cause to the court below with directions to dismiss the bill. It is so ordered." (Payne v. Houghton, 22 App. D. C., 234, 250.)

An appeal was taken to this court, and there the decree of the Court of Appeals was affirmed. On receipt of the mandate from this court, the Court of Appeals issued its mandate, ordering the court below to dismiss the bill. The bill was dismissed by the court below, but a motion to assess damages on the injunction bond was denied, as the court was of the opinion

that the bond was not liable. This ruling was appealed to the Circuit Court of Appeals, and there the decree was reversed and damages allowed for the full time the rates were restrained. This decree was reversed by this court, and a recovery permitted on the bond up to the time of the final decree in the court of original jurisdiction. The case was remanded, with directions to carry out this mandate.

LIABILITY ON THE BOND.

St. L., I. M. & S. Ry. v. McKnight, 244 U. S. 368, expressly holds that the bonds were not liable for claims accruing after the decree of permanent injunction had been entered by the lower court. This embraces the claims in Series C.

We accept this ruling as controlling.

The right of the claimants to recover for their claims in Series A and B is so like the right sustained in Houghton v. Meyer, 208 U. S. 149, that the point merits no further citation. The condition of the bond was express that the parties would repay to those entitled thereto the several amounts they collected by virtue of the temporary injunction. The additional bond, without sureties, required by the court, expressly provided that it was in addition to, and not in lieu of, the former bond.

The reversal of the decree necessarily reversed the provision of it releasing the injunction bond.

Barton v. Petit, 7 Cranch 288.

Houghton v. Meyer, *supra*.

RESTITUTION.

The judgments against complainants for the amount of the claims in Series "C," not sustainable against the bond are sustainable against complainants on the principle of restitution.

Northwestern Fuel Co. v. Brock, 139 U. S. 216, 218.

EXCEPTION TO CLAIM OF ARKADELPHIA MILLING COMPANY.

This claim is based upon what is termed in the record the rough material rates. These rates were available where the shipper transported over the line of the carrier a certain per cent of the product manufactured from the rough material.

The master found that these conditions were complied with and allowed the claim of this claimant. The exception of the railroad companies, which the court below sustained, was that the rates fixed by the Arkansas Railroad Commission in the tariff were unlawful because they discriminated between those persons who

made contracts with the carrier for the reshipment over its line of the manufactured product, and those who did not. As this exception only called to the attention of the court and the master the point that the discrimination was between those who made contracts and those who did not, it is perceived that the scope of the exception was very narrow. The tariff does not require shippers otherwise entitled to those rates to sign any particular form of contract with the carrier. They are only required to ship out the specified per cent of the manufactured products, the details of how security for this may be accomplished being left to arrangements between the carrier and the shipper.

The tariff authorizes the carriers to enter into suitable contracts with the shippers (Tr. 18, Item C.), the form of the contract to be approved by the Commission. Neither of complainant railroad companies submitted a form of contract to the Commission for its approval (Tr. 23). But they did as they had a right to do, and made such arrangements with the respective shippers to secure transportation of the finished product as the situation demanded. The exception called attention to nothing beyond this, and in sustaining it, the court below was in error.

In Sheffield etc. Ry. Co. v. Gordon, 151 U. S. 285, the court said (page 290):

"Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions."

If it is contended that the exception was broader and was sufficient to raise the point that the rates themselves were unequal and discriminated between those who were entitled to the rates under the tariff and those who were not, we dispute the assertion. However, viewing it from that standpoint, the position of the railway companies is untenable.

In the first place the argument is inadmissible in this proceeding. The tariff of the Arkansas Railroad Commission contained a complete system of rates applying to different commodities, different situations, with different kinds of hauls. In testing its equality, and therefore its reasonableness, it can only be properly inquired into as a whole.

This proceeding only involves a question whether this claimant is entitled to recover its excess payments. These payments are admittedly the difference between the tariff rates prescribed by the Arkansas Railroad

Commission, and the rates charged under protection of the injunction. Whether the rates in the tariff on any shipment or shipments are unreasonable on any account is not a question that can be litigated between the carrier and the shipper on the respective shipments. The shipper must rely on the legislative rate fixing power of the Railroad Commission to give him a reasonable rate, and so must the carrier, and if the courts are appealed to on the ground that any particular rate or rates are unreasonable, it must be in a proceeding against the rate fixing power. If the shipper and carrier could dispute in court over any rates in the tariff, it is readily realized that endless confusion would be brought about and the entire rate fixing plan of the state would be disjointed and destroyed.

In Texas & Pac. R. R. v. Abilene Cotton Oil Co., 204 U. S. 426, a similar question was before the court. In noticing the results of such a rule, the court said (page 440):

"This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an

established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question."

C. M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 460.

The rule announced in the concurring opinion of Justice Miller in the last cited case was approved and applied in In Re Engelhard, 231 U. S. 651.

Reagan v. Farmers Loan & Tr. Co., 154 U. S. 362.

Peik v. C. & N. W. Ry. Co., 94 U. S. 164, 178.

C., M. & St. P. Ry. Co. v. Ackley, 94 U. S. 179.

Amendment Number Four to the Constitution of Arkansas declared adopted January 13, 1899, created a railroad commission and authorized the Legislature to give them power to fix rates. The Legislature gave them large powers to fix rates by an act approved March 11, 1899. The powers conferred were similar to, probably greater, than those conferred by Congress on the Interstate Commerce Commission.

The acts of the Arkansas Legislature provided for notice to the carriers before a rate was fixed or a tariff changed, and a posting of all tariffs before they became effective. (Kirby's Digest, Sec. 6802, 6810). They provided for a hearing of complaints before the commission (Kirby's Digest, Sec. 6818). They provided that in actions between railroad companies and private parties the rates fixed by the commission should control:

"In all actions between private parties and railroad companies brought under the law establishing a railroad commission and defining its powers and duties, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held, deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein." (Kirby's Digest, Sec. 6809).

COMPLAINANTS ARE ESTOPPED FROM QUESTIONING THE REASONABLENESS OF THE RATE.

The railroad companies obtained the injunction in the court below upon the express condition set forth in the injunction bond that, "The complainants shall keep a correct account showing as respects the carriage of freight and passengers, the difference between the

amount actually charged and that which would have been charged had the inhibited rates been applied, and furtlier conditioned that if it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed by the Railroad Commission of the State of Arkansas in distance tariff No. 3 and the two cent per mile passenger rate prescribed by the Statute of 1907, should not have been made, that the complainant shall refund to the owners and holders of the certificates issued by it, the excess charges as shown by the same" (Tr. 6).

This obligation was unqualified, and the relief desired by the railroad companies was obtained from the court below on the faith of it. They should not be heard to say, when the time for payment arrives, that some of the rates in the tariff, on the basis of which they agreed to refund excess charges, were rates that the railroad commission should not have made.

Speake v. U. S., 9 Cranch 28, 37.

Cavender v. Cavender, 114 U. S. 464, 473.

Railroad Co. v. McCarthy, 96 U. S. 258, 267.

ATTITUDE OF COURTS ON SUCH QUESTIONS.

As the basis for rate making peculiarly depends upon the needs and customs of the community, the courts would be slow to dispute the reasonableness of

rates fixed by the legislative department of the State, or its authorized agencies.

Stone v. Farmers Loan & Tr. Co., 116 U. S. 307.

Sands v. Manistee R. Imp. Co., 123 U. S. 288.

Louisville No. & T. R. Co. v. Miss., 133 U. S. 587.

Alabama & V. R. Co. v. R. R. Commission, 203 U. S. 496.

San Diego Loan, etc., Co. v. Nat'l City, 174 U. S. 739.

Chicago, etc., R. Co. v. Wellman, 143 U. S. 339.

Reagan v. Farmers' Loan, etc., Co., 154 U. S. 362.

Smyth v. Ames, 169 U. S. 466, 524.

RATE FIXING IS A PRACTICAL QUESTION AND IS NOT SUSCEPTIBLE OF NICE SCIENTIFIC REFINEMENTS.

The various interests of the carriers, as well as the public, must be known to, and carefully considered by, the rate making body, in order that an equal system of rates may be fixed. There are many differences in rates applied to different commodities, because of dif-

ferences in value, differences in bulk, and many other differences. There is the difference in a car load and less than a car load, the difference in minimum weights, the difference because of competition, and the difference because of the different industries served.

A rate on a certain commodity, so high that, from a practical standpoint, it would be prohibitory, would be unwise. It is a matter of common knowledge that carriers, at first, and, later, rate making bodies, have uniformly fixed their rates so that raw material could be moved to factories. If the rate did not permit this movement, the factories could not exist and the carriers would not realize the income from the manufactured product. The first of these classes of rates, in a sparsely settled country, is the forest product rates, of which the rate complained of is an illustration.

It is presumed that this rate is appropriate to the needs of the carrier and those who embark on development of the country. Without factories to manufacture the forest products, they would not be manufactured, and the only transportation of them would be for occasional orders that would be negligible, both to the carriers and to the public.

On the other hand, if the forest products can move to the mills and factories on a reasonably low rate, the people would be encouraged to build factories, and the

carrier would receive a profit from the transportation of the manufactured product, even though he moved the raw material at cost, or less. The benefits to the public in the development of the country, the erection of factories, and the benefits to the carrier are obvious.

The rough material rates now assailed are of this kind. They apply equally to all in the class dealt with.

The Supreme Court of Arkansas had occasion to consider and sustained the rough material rates in Chapman & Dewey Lbr. Co. v. J. L. C. & E. R. R. Co., 97 Ark. 300, 307, where the rates were directly attacked.

Since about the year 1898 similar rough material tariffs have been in force in Arkansas (Tr. 25).

THE CLAIM OF J. F. HASTY & SONS NOT BASED ON MOVEMENTS IN INTERSTATE COMMERCE.

The exception to the master's report allowing the claims of J. F. Hasty & Sons, sustained by the court below was that the shipments, to which the master had applied the rates named in the Arkansas tariff, were movements in interstate commerce.

The commodities were raw material, consisting of "bolts, rough staves or rough heading." In the woods trees would be cut down and sawed into lengths, and these lengths would be split into quarters or a less

fraction of the piece. Bolts were the pieces into which a length or cut was split, from which several barrel staves, headings or hoops could be made. Rough staves or rough heading were pieces of the size from which but one stave or piece of heading could be made. They were the lengths of rough timber cut in the woods for convenient transportation to the mills, at which a particular product would be manufactured (Tr. 23). When the rough material reached the mill they would be manufactured into finished staves, headings or hoops, and in this condition shipped to whoever purchased them.

When the rough material left the woods, a bill of lading was issued from the woods to the mill. When it reached the mill and was finished or manufactured into some or all of the articles described, it was stacked in the yards or placed in kilns to dry. The process of manufacturing and trying occupied several months, the reasonable average being stated to be five months. From this stock of finished material claimants made sales. At the time the rough materials were shipped to the mills the mills did not know to whom they would sell the finished product, or to what point it would be shipped; but did know there was little market for the finished product in the State of Arkansas, and expected they would sell 95 per cent of the finished articles and ship them to points outside the State of Arkansas. When or to whom they would sell them they did not

know. When the manufactured product was sold and shipped out, it took the regular rate for the shipment of that commodity from the mill to destination, and an ordinary waybill between those points was issued. The rate from the woods to the mill on the rough material, plus the rate from the mill to destination of the manufactured article, was substantially more than the through rates would be on a shipment of the same manufactured article from the woods to the final destination of the manufactured product if the movement had been continuous.

We respectfully submit that the movement of the rough material from the woods to the mill had none of the characteristics of, nor was it, a movement in interstate commerce.

There was no continuous movement. When the rough material left the woods no one knew where the manufactured product might be shipped. After the product was manufactured, it remained in the mill an average of five months, and during that time the owners sought its market and sold it. It came to rest at the mill, and where it would eventually go no one could foretell.

If previous experience in the business was sufficient to indicate that the conditions of the market were such, that 95 per cent of the manufactured product

would be shipped out of the State, this is so of a great many of the products in the Southern and Western States. When the cotton buyer in the Southern States purchases cotton and has it shipped to his warehouse, he knows that the market for nearly all of it is beyond the State. So does the manufacturer of cottonseed oil and many other commodities. It has never been contended that the initial movements of this raw material within the State are movements in interstate commerce.

AN EXPECTATION TO SELL AND SHIP GOODS BEYOND THE STATE DOES NOT CREATE INTERSTATE COMMERCE.

As the movement from the mill to the destination of the manufactured product was not a continuation of the movement to the mill, it would seem the only idea that can be advanced to indicate that the movement of the rough material was a movement in interstate commerce, is the idea that as the manufacturer expected his product would be sold to parties outside the State and shipped there, this expectation of itself constituted the movement from the woods interstate commerce. This idea has been argued before this court at various times in varying situations and always held by this court unsound. In the tax case of Coe v. Errol, 116 U. S. 517, the contention was denied, the court saying (page 525):

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * *

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. * * *

"Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing" (page 528).

The announcement of the rule in the second quotation from Coe v. Errol was expressly approved in McClusky, Admr., v. M. & N. Ry. *et al.*, 243 U. S. 36.

General Oil Co. v. Crain, 209 U. S. 211, involved the validity of a charge imposed under authority of the State of Tennessee for the inspection of oil shipped to Memphis and there held in tanks "a few days" (page 213) to fill orders for shipments into Arkansas.

After reviewing the decisions on the question, the court held the "oil was not property in interstate commerce," saying (page 231):

"Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State etc. v. Engle, *supra*, but for the business purpose and profit of the company."

American Steel & Wire Co. v. Speed, 192 U. S. 500, 518, presented a situation where appellant shipped goods to Memphis, Tenn., where they were held until resold in Tennessee and adjoining States. It was contended that while the goods were in Memphis, they were not subject to taxation by the State of Tennessee because they were moving in interstate commerce, but the court said (pages 518, 519):

"With these facts in hand, we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated."

United States v. E. C. Knight Company, 156 U. S. 1, was a suit brought under the anti-trust law of the United States to cancel a contract to acquire control of a sugar refinery in the State of Pennsylvania. It was urged that, as practically all of the output of the refinery was shipped beyond the State, the expectation or intent of the owners made the manufactured articles articles in interstate commerce. Of this argument the court said (page 13):

"The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

In Kidd v. Pearson, 128 U. S. 1, the court said (page 21):

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended

to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management.

"It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details."

Brown v. Houston, 114 U. S. 622, 629, 632.

Pittsburg & So. Coal Co. v. Bates, 156 U. S. 577.

Bacon v. Illinois, 227 U. S. 504, 513.

The value of the cited cases is not impaired but made clearer by those cases decided by this court, where the form the parties gave the transaction indicated the transit had ended but the substance showed the real transaction was a movement in interstate commerce, such as:

Southern Pacific Terminal Co. v. Int. Com. Com., 219 U. S. 498.

Ohio R. R. Commission v. Worthington, 225 U. S. 101, 108.

T. & N. O. R. R. Co. v. Sabine Tram. Co., 227 U. S. 122.

R. R. Com. of La. v. T. & P. Ry. Co., 229 U. S. 336.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 349.

Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456, 468.

Ill. Central Ry. Co. v. Louisiana R. R. Com., 236 U. S. 157, 163.

Hendrick v. Maryland, 235 U. S. 610.

Kane v. N. J., 242 U. S. 160.

Respectfully submitted,

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